



ENVIRONMENTAL LAW.  
FROM THE INSIDE OUT™.

May 20, 2016

Eric J. Murdock, Esq.  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Avenue, N.W.  
Washington, DC 20037  
Email: [emurdock@hunton.com](mailto:emurdock@hunton.com)  
(Attorney for Pepco Holdings, Inc. and Potomac Electric Power Company)

Nancy Flickinger, Esq.  
United States Department of Justice  
Environment and Natural Resources Division, Environmental Enforcement Section  
601 D Street N.W.  
Washington, D.C. 20004  
Email: [nancy.flickinger@usdoj.gov](mailto:nancy.flickinger@usdoj.gov)  
(Attorney for the United States and the U.S. Environmental Protection Agency)

**Re: 60-Day Notice of Intent to File Citizen Suit under Clean Water Act for  
Violations of Terms and Conditions of District of Columbia NPDES  
Individual Permit DC0000094- Outfall 101 at Pepco's Benning Facility**

Dear Mr. Murdock and Ms. Flickinger:

This letter is a second, separate, 60-Day Notice of Intent to File Citizen Suit under Clean Water Act that Anacostia Riverkeeper is sending to Pepco. Our first letter was sent on September 11, 2015, and identified permit violations occurring at Outfall 013 located within Pepco's Benning Road Facility. This letter, as described in greater detail below, identifies unreported discharges that violate Pepco's NPDES permit and which have occurred and are occurring at Outfall 101 located within Pepco's Benning Road Facility.

On behalf of the Anacostia Riverkeeper ("Claimant") and its members, and in accordance with Section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365, 40 C.F.R. Part 135, this letter constitutes notice with regard to violations of the CWA at the Benning Road Generating Station and Service Center Facility (the "Facility" or "Pepco Facility" or "Site") located at 3400 Benning Road, NE, Washington, DC 20019. The purpose of this letter is to notify the owners and operators of the Facility, namely the Potomac Electric Power Company and Pepco Holdings, Inc., individually and d/b/a Pepco (collectively, "Pepco"), of ongoing and continuous violations occurring at the Facility of "an effluent standard or limitation" under Section 505(a)(1)(A) of the CWA, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with the terms and conditions of District of Columbia National Pollutant Discharge Elimination System ("DC/NPDES") Individual Permit DC0000094 ("Individual NPDES Permit" or "Individual Permit").

Facility – is listed as impaired for biological oxygen demand, bacteria, organics, metals (including TMDLs for Copper, Lead and Zinc), total suspended solids, and oil and grease.

As long as the Facility discharges contaminants in exceedance of its Individual NPDES Permit's limits, the Facility will directly cause further degradation of already sensitive surface water, groundwater and sediments of the Anacostia River and its surrounding areas, which also constitute continuing violations of the CWA, as described in this letter.

### **Type and Extent of Violations**

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. §1342. Each violation of the permit – and each discharge in exceedance of or otherwise not authorized by the permit – is a violation of the CWA.

Outfall 101 is a point source as defined by Section 502 of the CWA, 33 U.S.C. § 1362(14), and the discharge of pollutants from Outfall 101 is regulated under the conditions of Individual NPDES Permit DC0000094. Pepco is authorized by its permit to discharge storm water from Outfall 101, and may do so with no limits to the amount of pollutants it discharges<sup>1</sup>. However, Pepco is required by its permit to monitor discharges from its Outfall 101. Further, Pepco is required to notify the EPA *in writing* if there is an activity that has occurred or will occur which would result in any discharge, in a routine or frequent basis, of a toxic pollutant that is not limited by the permit. It is this last requirement that Pepco has violated and is the subject of this 2<sup>nd</sup> Notice of Intent to Sue.

Pepco is required to monitor at Outfall 101 for the following heavy (and toxic) metals:

Outfall 101 shall be monitored for the metals total recoverable iron, cadmium, nickel, copper, lead and zinc<sup>2</sup>.

Pepco's permit contains Part VI. Reporting Requirements, Section 8 "*Changes in Discharges of Toxic Substances*." Here, the permit requires that the permittee shall notify EPA in writing as soon as it knows or has reason to believe:

- a. That any activity has occurred or will occur which would result in the discharge, in a routine or frequent basis, of any toxic pollutant which is not

---

<sup>1</sup> A facility may invoke its permit as a shield for its discharges at an unlimited discharge point only so long as it complies with the 'notification requirement.' Policy Statement on Scope of Discharge Authorized and Shield Associated with NPDES Permits (July 1, 1994), available at <http://www.epa.gov/compliance/resources/policies/civil/cwa/shield.pdf>. See also 45 Fed. Reg. 33,516, 33,523 ( May 19, 1980) ( " a permittee may discharge a . . . pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee so long as the permittee complies with the notification requirements of the [regulation]" ).

<sup>2</sup> Outfall 101 sampling requirements are set out in the Permit at p. 5.



Table 1. Twenty-seven discharge events of toxic pollutants greater than 100ug/l at Outfall 101.

Perm Feature ID	Limit Set Designator	Parameter Code	Parameter Desc	Limit Value	Limit Value Requirement Short	Limit Unit Short Desc	Limit Frequency of Analysis Desc	Limit Value Type Desc	Statistical Base Short Desc	DMR Value	NODI Code	Monitoring Period End Date
101	Q	01051	Lead, total [as Pb]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	130		09/30/2011
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	570		09/30/2011
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	240		12/31/2011
101	Q	01042	Copper, total [as Cu]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	120		03/31/2012
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	390		03/31/2012
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	400		06/30/2012
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	140		09/30/2012
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	120		12/31/2012
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	180		03/31/2013
101	Q	01042	Copper, total [as Cu]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	110		06/30/2013
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	480		06/30/2013
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	490		09/30/2013
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	460		12/31/2013
101	Q	01042	Copper, total [as Cu]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	320		03/31/2014
101	Q	01051	Lead, total [as Pb]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	130		03/31/2014
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	270		03/31/2014
101	Q	01042	Copper, total [as Cu]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	4500		06/30/2014
101	Q	01051	Lead, total [as Pb]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	1900		06/30/2014
101	Q	01067	Nickel, total [as Ni]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	410		06/30/2014
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	3400		06/30/2014
101	Q	01042	Copper, total [as Cu]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	190		09/30/2014
101	Q	01051	Lead, total [as Pb]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	190		09/30/2014
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	350		09/30/2014
101	Q	01042	Copper, total [as Cu]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	140		12/31/2014
101	Q	01051	Lead, total [as Pb]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	310		12/31/2014
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	270		12/31/2014
101	Q	01092	Zinc, total [as Zn]		Req. Mon.	ug/L	Quarterly	Concentration2	MO AVG	150		03/31/2015

The above chart reflects violations of Pepco's obligation to notify EPA in writing of discharges from Outfall 101 of toxic pollutants over the past five years, through March, 2015. This chart represents twenty-seven separate violations of the Act by Pepco. Additional information, including information in Pepco's possession, may reveal additional violations. For example, this letter covers violations based on most recent publically available DMR data. These violations are likely to continue or reoccur after the date of this notice, or the date of the most recent publically available data- March, 2015. Claimant intends to sue for all violations, including those yet to be uncovered and those committed after the date of this notice letter.

In 2011, Pepco entered into a Consent Decree (the "Consent Decree") with DDOE regarding the Facility. The enforcement action by DDOE resulted from six (6) documented releases of PCBs between 1985 and 2003, and was brought pursuant to the Resource Conservation and Recovery Act, and under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607, and under Section 401(a)(2) of the District of Columbia Brownfield Revitalization Act of 2000.

Pursuant to the Consent Decree, Pepco was required to perform a Remedial Investigation / Feasibility Study, to characterize current environmental degradation at the Facility, as well as investigate whether – and to what extent – past discharges have contributed to contamination of the River. The Consent Decree further requires PEPCO to develop and evaluate cleanup options for those contaminants, and set milestones for these requirements. The agreement includes a

Any person who negligently violates Section 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act, any permit condition or limitation implementing any such section shall be punished by a fine of not less than \$2,500 nor more than \$27,500 per day of such violation, or by imprisonment for not more than 1 year, or by both.

Any person who knowingly violates any permit condition or limitation implementing Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of such violation or by imprisonment for not more than 3 years, or by both.

Furthermore, the CWA provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318 or 405 of the Act is subject to an administrative penalty not to exceed \$37,500 per day for each violation.

Upon information and belief, and as discussed more fully above, the past and ongoing management practices at the Pepco Facility have resulted in repeated and ongoing discharges into the Anacostia River, comprising twenty-seven separate violations of the Individual NPDES Permit.

#### **Notice of Intent to Bring CWA Citizen Suit Litigation**

As stated above, this letter serves as Notice to the owners and operators of the Pepco Benning Road Generating Station and Service Center Facility, located at 3400 Benning Road, NE, Washington, DC 20019, namely, Wesley McNealy, Potomac Electric Power Company and Pepco Holdings, Inc., that pursuant to Section 505(a)(1) of the CWA, 33 U.S.C. §1365(a)(1), the Anacostia Riverkeeper, on behalf of its members, intends to file a citizen suit against each of the Persons and Entities to whom this letter is addressed as persons responsible for violations of the CWA. Upon information and belief, the Persons and Entities to whom this letter is addressed are the owners, operators, site managers, onsite representatives, and/or registered agents of the entities to whom this letter is addressed and/or the Pepco Facility.

In particular, the Facility – through its owners, operators, site managers, representatives, and/or agents - has discharged, and continues to discharge, pollutants associated with storm water into the Anacostia River, in violation of the CWA and the Individual NPDES Permit. The organization identified below as Claimant will initiate a citizen suit under the Section 505(a)(1) of the CWA against all of the persons and entities to whom this letter is addressed on, or shortly after, 60 days from the postmark of this notice unless the violations described herein are fully remedied. *See* 33 U.S.C. §1365(a)(1).

This letter serves as notice to each of the Persons and Entities to whom this letter is addressed that unless the violations described in this Notice are corrected:

Sincerely,

JACOBS STOTSKY PLLC

A handwritten signature in black ink, appearing to read "Dana J. Stotsky", written over a horizontal line.

By: Dana J. Stotsky  
1629 K Street, NW, Suite 300  
Washington, DC 20006  
(202) 417-6750 (office)  
(703) 740-7986 (cell)

Attachment A



**ATTACHMENT A**

EXCERPTS TO:

**AUTHORIZATION TO DISCHARGE  
UNDER THE NATIONAL POLLUTANT  
DISCHARGE ELIMINATION SYSTEM  
INDUSTRIAL PERMIT NO. DC0000094**

Pages 1, 23, 24, 25 and 30.

Attachment A contains a total of SIX pages, including this Cover Sheet.

- i. The "daily maximum" temperature means the highest arithmetic mean of the temperature observed for any two (2) consecutive hours during a 24-hour day, or during the operating day if flows are of shorter duration.
- j. "At outfall XXX" - A sample location before the effluent joins or is diluted by any other waste stream, body of water, or substance or as otherwise specified.
- k. Estimate - To be based on a technical evaluation of the sources contributing to the discharge including, but not limited to pump capabilities, water meters and batch discharge volumes.
- l. Non-contact cooling water means the water that is contained in a leak-free system, i.e. no contact with any gas, liquid, or solid other than the container for transport; the water shall have no net poundage addition of any pollutant over intake water levels, except as authorized by this permit.

## **PART VI. REPORTING REQUIREMENTS**

### **1. Planned Changes**

The permittee shall give written notice to EPA as soon as possible of any planned physical alterations or additions to the permitted facility, or any change in chemical additives. If EPA determines that any such changes will require a permit modification, it shall so inform the permittee within thirty (30) days so the permittee can submit the appropriate permit application information.

### **2. Anticipated noncompliance**

The permittee shall give advance written notice to EPA of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

### **3. Transfers**

This permit is not transferable to any person except after notice to EPA as specified in Part III.12. EPA may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Clean Water Act.

### **4. Monitoring Reports**

Monitoring results shall be reported at the intervals and in the form specified in Section V.5.

### **5. Compliance Reports**

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any permit shall be submitted no later than 14 days following each schedule date. Any reports of noncompliance may include any remedial actions taken, and the probability of meeting the next scheduled requirement.

For activity that has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant that is not limited by this permit, the notification levels of 122.42(a)(2) shall apply.

**9. Duty to Provide Information**

The permittee shall furnish to EPA, within a reasonable time, any information which EPA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to EPA, upon request, copies of records required to be kept by this permit.

**10. Duty to Reapply**

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application shall be submitted at least 180 days before the expiration date of this permit. EPA may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date. In the event that a timely and complete reapplication has been submitted and EPA is unable, through no fault of the permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit are automatically continued and remain fully effective and enforceable.

**11. Signatory Requirements**

All applications, reports or information submitted to EPA shall be signed and certified as required by 40 C.F.R. § 122.22.

**12. Availability of Reports**

Unless a business confidentiality claim is asserted pursuant to 40 C.F.R. Part 2, all reports submitted in accordance with the terms of this permit shall be available for public inspection at the offices of the DDOE and the Regional Administrator. If a business confidentiality claim is asserted, the report will be disclosed only in accordance with the procedures in 40 C.F.R. Part 2. As required by the Act, permit applications, permits and effluent data shall not be considered confidential.

**13. Penalties for Falsification of Reports**

The Clean Water Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring report or reports of compliance or noncompliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

**14. Correction of Reports**

If the permittee becomes aware that it submitted incorrect information in any report to EPA, it shall promptly submit the correct information.